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No. 97-1109

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

LAND AND LAKES COMPANY, an Illinois Corporation, and STONY ISLAND RECLAMATION CO., an Illinois Corporation,

Petitioners,

v.

HENRY L. HENDERSON, in his official capacity as Commissioner of the Department of the Environment, and THE CITY OF CHICAGO, a Municipal Corporation,

Respondents.

LAND AND LAKES COMPANY, an Illinois Corporation, and STONY ISLAND RECLAMATION CO., an Illinois Corporation,

Petitioners,

v.

CITIZENS FOR A BETTER ENVIRONMENT, CALUMET ECOLOGICAL PARK ASSOCIATION, THE PEOPLE FOR COMMUNITY RECOVERY, SOUTHEAST ENVIRONMENTAL TASK FORCE, CHICAGO RECYCLING COALITION and THE LAKE MICHIGAN FEDERATION,

Respondents.

On Petition for Writ of Certiorari to the Illinois Appellate Court, First District

BRIEF FOR RESPONDENTS, CITIZENS FOR A BETTER ENVIRONMENT, ET AL., IN OPPOSITION

JAMES A. ROMANYAK*
SARAH A. JOHNSON
ANDREW H. KIM
ARI J. ROSENTHAL
BELL, BOYD & LLOYD
70 W. Madison St., Suite 3300
Chicago, Illinois 60602
(312) 372-1121

**Counsel of Record* *Attorneys for Respondents*

Midwest Law Printing Co., Chicago 60610, (312) 321-0220

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QUESTION PRESENTED

Whether substantive due process requires the City of Chicago to issue an operating permit that would allow a landfill to expand when the City Council has enacted a municipal ordinance placing a moratorium on the issuance of operating permits for new or expanded sanitary waste landfills within the City.

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OPINIONS BELOW

The decision of the Illinois Appellate Court is unpublished. The decision of the Circuit Court of Cook County, Illinois is unpublished. The Illinois Supreme Court denied the Petitioners' Petition for Leave to Appeal and did not issue a decision.

JURISDICTION

This Court has no jurisdiction over this case pursuant to 28 U.S.C. § 1257(a) because the highest court of Illinois has not yet rendered a final judgment within the meaning of section 1257(a). The Petitioners have a federal takings claim under the Fourteenth Amendment of the United States Constitution pending in the Circuit Court of Cook County.

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment provides, in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ." U.S. Const. Amend. XIV, § 1.

ORDINANCE INVOLVED

The section of the Municipal Code of Chicago, Illinois, in effect at the time this case was litigated in the Circuit Court of Cook County provided, in pertinent part:

> Prior to February 1, 1996, notwithstanding any provision of this chapter: (1) no permit shall be issued nor modification of any permit allowed for the expansion of any existing sanitary landfill or

> liquid waste handling facility which utilizes deep well injection or landfill as a means of waste disposal, and (2) no permit shall be issued for the creation or operation of a new sanitary landfill site or liquid waste handling facility which utilizes deep well injection or landfill as a means of waste disposal. Municipal Code of Chicago, Ill. § 11-4-1520(F) (1994).

This ordinance has since been renewed.

STATEMENT

Respondents, THE CITIZENS FOR A BETTER ENVIRONMENT, CALUMET ECOLOGICAL PARK ASSOCIATION, THE PEOPLE FOR COMMUNITY RECOVERY, SOUTHEAST ENVIRONMENTAL TASK FORCE, CHICAGO RECYCLING COALITION, AND THE LAKE MICHIGAN FEDERATION (hereinafter collectively the "Public Interest Organizations"), adopt the statement of the nature of the case made by Respondents, THE CITY OF CHICAGO and HENRY L. HENDERSON. Further, the Public Interest Organizations state that they are local and regional not-for-profit community groups, all with members living on the south side of Chicago, working for the betterment of the environment in the area encompassing the Land and Lakes waste disposal facility. The Public Interest Organizations sought to intervene in the action on the side of the City of Chicago pursuant to the Illinois Code of Civil Procedure, 735 ILCS 5/2-408, because the Public Interest Organizations believed that their interests and the interests of their members are not adequately represented by the existing parties to this proceeding and because they and their members have unique interests which require separate

and independent presentation. Thus, the Public Interest Organizations submitted to the court an initial pleading seeking an injunction as a result of private injuries caused by a public nuisance in violation of the Chicago Municipal Code Section 11-4-1500, an injunction as a result of private injuries caused by a public nuisance in violation of Municipal Code Sections 11-4-250 and 11-4-1550, an injunction as a result of negligent operation of the landfill, and a declaratory judgment regarding Petitioners' constitutional challenge to the Ordinance and a declaratory judgment regarding the applicability of the moratorium to the site on which Petitioners were expanding.

In an order dated May 25, 1994, the Circuit Court denied the Public Interest Organizations' Petition to Intervene, stating that they did not have a unique interest in the litigation and were adequately represented by the City of Chicago.

On June 10, 1994, the Circuit Court denied the Public Interest Organizations' Motion to Reconsider and Motion for an Illinois Supreme Court Rule 304(a) finding that there is no just reason to delay appeal of the Court's order denying the Petition to Intervene. The Public Interest Organizations petitioned the Illinois Supreme Court for a Writ of Mandamus or, in the alternative, a Supervisory Order directing the Circuit Court to enter a Supreme Court Rule 304(a) ruling. The Illinois Supreme Court granted the Public Interest Organizations' Motion and entered a Supervisory Order directing the Circuit Court to enter a Supreme Court 304(a) finding on March 28, 1995.

On April 24, 1995, the Public Interest Organizations filed a Notice of Appeal from the order of the Circuit

Court denying them the right to intervene in the Land and Lakes action. Pursuant to Illinois Supreme Court Rule 301, the Public Interest Organizations also filed a Notice of Appeal from the Circuit Court's orders entering judgment in favor of Land and Lakes and against the City of Chicago on count I (declaratory judgment), count II (preemption), count IV (procedural due process) and count V (substantive due process) as parties who would be affected by these judgments. The Illinois Appellate Court consolidated the Appeals of the Public Interest Organizations and the City of Chicago on May 17, 1995.

On December 31, 1996, the Illinois Appellate Court entered an order and filed an opinion reversing the Circuit Court and vacating the injunction. However, it did not rule on the Public Interest Organizations' separate appeal regarding their right to intervene in the litigation. The Public Interest Organizations filed a Petition for Leave to Appeal the Appellate Court's decision on May 12, 1997. The Illinois Supreme Court denied the Petition for Leave to Appeal on October 1, 1997.

ARGUMENT

Petitioners' petition for writ of certiorari should be denied because this Court has no jurisdiction under 28 U.S.C. § 1257(a) to hear cases in which further proceedings are pending within the lower courts of the state. Section 1257(a) limits the Supreme Court's power to review state court judgments by writ of certiorari to final judgments or decrees rendered by the highest court of a state in which a decision may be had. Pursuant to this rule of finality, the Court has refused to hear cases

when "anything further remains to be determined by a State court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court of the State." *Radio Station WOW v. Johnson*, 326 U.S. 120, 124 (1945). This requirement that judgments be final prior to Supreme Court review is "an important factor in the smooth working of our federal system." *Id.* The requirement serves to avoid piecemeal federal court review of state court decisions and minimizes federal intrusions in state affairs. *See North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 159 (1973). Because Petitioners' federal takings claim has been remanded by the Illinois Appellate Court and has been reinstated by the Circuit Court of Cook County where it is currently pending, the Court should deny this petition for certiorari until all issues pending before the Illinois courts are resolved.

While the Court has acknowledged that there are limited circumstances that may require departure from this traditional rule of finality, these circumstances are not present in this case. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477-78 (1975). The Court in *Cox* identified four categories of cases where it had departed from the traditional rule of finality to take jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts. The Court specifically noted:

> [In] most, if not all, of the cases in these categories, these additional proceedings would not require the decision of other federal questions that might also require review by the Court at a later date. . . . [I]mmediate rather than delayed review would be the best way to avoid the mischief

> of economic waste and of delayed justice, . . . as well as precipitate interference with state litigation. *Cox Broadcasting Corp.*, 420 U.S. at 477-78 (citation omitted).

Because the Circuit Court of Cook County has reinstated the Petitioners' federal takings claim, this pending proceeding will require the decision of a federal question which may also require review by the Court at a later date. Thus, Petitioners' case is distinguished from the limited circumstances in which the Court has departed from the traditional rule of finality.

Moreover, the Petitioners' claim does not fit into any of the four categories of *Cox*. First, the substantive due process issue is not conclusive and the outcome of the lower court proceedings are not preordained. Although the Court has taken jurisdiction where the state court's decision on a federal issue rendered the decision on remand an inexorable certainty, this is not such a case. *See Cox Broadcasting Corp.*, 420 U.S. at 479. The Illinois Appellate Court's decision with respect to the due process claim in no way determines the outcome of the takings and estoppel claims in the trial court. Those issues will undergo an entirely different analysis from the due process claim, and indeed, the lower court will be free to disregard the appellate court's decision in arriving at its own decision on the takings and estoppel issues. Because the state court's decision on the federal issue in this case is not determinative of the other issues to be decided on remand, Petitioners do not meet the first exception to the rule of 28 U.S.C. § 1257.

The federal issue upon which the Petitioners base their petition for certiorari also does not fit into the second category of *Cox*, which allows the Court to hear the

case when the federal issue requires a decision regardless of the outcome of the state proceedings. The Court may hear a case when nothing could happen in the lower state court proceedings which would foreclose or make unnecessary a decision on the federal question. *See Radio Station WOW*, 326 U.S. 120; *see also Costarelli v. Massachusetts*, 421 U.S. 193, 196 (1975) (important purpose of final judgment rule is to prevent interference with state proceedings when underlying dispute may be otherwise resolved). In *Radio Station WOW*, the Court took jurisdiction over a decision that transferred ownership of a radio station and its properties to its original owner although additional state proceedings involving an accounting of profits had not yet occurred. The Court found that nothing could happen during the accounting proceedings which would foreclose or make unnecessary the federal decision, except settlement of the case. *Radio Station WOW*, 326 U.S. at 127. Because the federal issue would survive regardless of the outcome of the state court proceedings, the Court took jurisdiction so as to promote judicial economy and to avoid prolonged litigation.

Here, however, the Petitioners ultimately could prevail on either their state law claims or their federal takings claim such that a decision by this Court on their substantive due process claim would be unnecessary. If the Petitioners prevailed in the pending state court proceedings prior to any action by this Court on the due process claim, they may be satisfied by the relief granted and abandon their pursuit of relief based on their due process claim. Thus, to decide the federal issue at this time would waste judicial resources, because such a decision may never be necessary, and would further prolong an

already protracted litigation. Petitioners may petition for certiorari at a later time when the entire litigation has concluded and all federal issues have been decided.

Third, the Court will be able to review the federal issue at a later time. Under the third exception of *Cox*, the Supreme Court has jurisdiction if the federal issue will not survive the determination of the trial court and will have no other chance of coming before the Supreme Court. *Cox Broadcasting Corp.*, 420 U.S. at 481. In these cases, the decision of the trial court on remand will either render the federal issue moot or will otherwise preclude the ability of petitioners to seek review in this Court. *See North Dakota State Board of Pharmacy*, 414 U.S. 156. Such is not the case here. The due process issue will survive the decision of the trial court on the takings and estoppel issues. If Petitioners lose in the trial court on the takings and state law claims, Petitioners may then request certiorari in this Court, consolidating both the due process and the takings issues in a single petition and thereby conserving this Court's resources. If Petitioners prevail in the trial court, Petitioners may still seek review of the due process issue. This case therefore does not warrant certiorari under the third exception enumerated in *Cox*.

Finally, this Court's refusal to review the federal issue would not seriously erode federal policy; thus, the fourth and final category of cases enumerated in *Cox* also does not apply. *See Cox Broadcasting Corp.*, 420 U.S. at 483. When the state court has finally decided the federal issue before the Court and when, at the same time, it remains possible for the claimant to prevail in the state court on nonfederal grounds, review by the Court is unnecessary because the ongoing state court proceedings

may obviate the Court's decision. However, in certain circumstances, the Court nevertheless will entertain the case because by doing so it could prevent serious erosion of federal policy by reversing the state interpretation of the federal issue and precluding all further litigation. In these rare cases, most notably where First Amendment issues are at stake, the Court has taken jurisdiction despite ongoing state court proceedings.

Such a scenario is not present in the instant proceeding. Here, the substantive due process issue involves no protected right upon which the Court has granted heightened scrutiny. Instead, this case involves the power of a municipal corporation to regulate a waste disposal site within its borders. There is no significant federal policy that would be seriously eroded by allowing the City of Chicago to regulate waste disposal within its borders. Rather, substantive due process, with the exception of the few protected rights not implicated here, provides only that a government action be rationally related to a legitimate governmental purpose. In effect, any substantive due process "federal policy" regarding land use regulations merely provides Petitioners with a limited protection from arbitrary and unreasonable government action. Given the limited protection provided by substantive due process, this case does not risk an erosion of federal policy if this Court declines to review the case.

CONCLUSION

The requirement of a final judgment in the highest state court is a fundamental rule of Supreme Court jurisdiction. Requiring Petitioners to observe this rule will

result in no prejudice to the Petitioners. Petitioners are not being forced to suffer a hollow exercise in appellate procedure. On the contrary, they currently have a claim they wish to have heard in the Circuit Court of Cook County and, therefore, should wait for the trial court's decision on that claim before seeking review in this Court of another claim. Petitioners have asked the Court to do precisely what 28 U.S.C. § 1257 prohibits: piecemeal review of the federal issues involved in a particular case.

The petition for a writ of certiorari therefore should be denied.

Respectfully submitted,

JAMES A. ROMANYAK
Counsel of Record
SARAH A. JOHNSON
ANDREW H. KIM
ARI J. ROSENTHAL
BELL, BOYD & LLOYD
70 West Madison Street
Suite 3300
Chicago, Illinois 60602
(312) 372-1121

Attorneys for Respondents